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Docket Management System
Attn: Docket No. FAA-2002-11301
Department of Transportation
400 7th Street, SW
Room PL401
Washington, DC, 20590-0001

http://dms.dot.gov/submit

VIA ELECTRONIC SUBMISSION and EXPRESS MAIL

Re: Notice of Proposed Rulemaking, "Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities": NPRM, 67 FR 9366.

Following are the comments of Bensinger, DuPont and Associates (BDA) concerning the above-referenced notice of proposed rulemaking. Overall, BDA endorses the changes proposed by the FAA and commends the FAA for its efforts to clarify the regulations and streamline the substance abuse prevention programs. There are two areas, however, about which we have some concerns.

Use of "Hire"

The use of the term "hire" could be problematic. As the NPRM currently stands, an applicant for a maintenance position, for example, could be asked to demonstrate his or her skills without being subject to pre-employment testing (or any other kind of testing, for that matter since only employees--who are defined as persons already hired--must be subject to testing). It also appears that individuals who perform services on a voluntary basis (*e.g.*, a family member at a small charter operation) or through barter (*e.g,* a mechanic who exchanges services for flight instruction) would not be subject to testing.

Therefore, we recommend that the FAA:

1. Add a definition of "hire" that states that the term includes retaining the services of the individual as a paid employee, a volunteer, or through other forms of compensation (e.g., barter).

2. Specifically prohibit the performance of safety-sensitive duties by an applicant or as part of the application process.

Pre-employment/Transfer Testing

As written, the provision on pre-transfer testing only applies to individuals who affirmatively leave their prior position and move to a safety-sensitive one. In small companies especially, such transfers might not occur, yet an individual could begin to perform safety-sensitive duties. Possible examples include a parts warehouseman who performs maintenance on an as-needed basis or a reservations clerk who is trained to do weight and balance calculations.

Therefore, BDA recommends that the provision be revised to read:

> No employer shall allow an individual currently employed by the employer to transfer from a nonsafety-sensitive position to a safety-sensitive job or to otherwise begin to perform safety-sensitive duties for the employer unless the employer first receives a verified negative drug test result for the individual.

Reasonable Cause/Suspicion Testing

BDA agrees that employers must have the ability to require contractor employees under their supervision to undergo reasonable cause drug testing and/or reasonable suspicion alcohol testing in the appropriate cases. However, as proposed, this provision is permissive, not mandatory. This raises the possibility that the employer could choose *not* to subject the contractor employee to testing, which could mean the employee was not tested at all. It also does not provide any procedural or other guidance for actually effecting the testing. What if, for example, the employer directs the test but the contractor elects not to make arrangements for the test to occur? Or if there is no way to arrange for the contractor's service providers to obtain a specimen in a timely manner?

Nor does the provision indicate what steps the employer can or must take after the contractor employee has been identified as a possible drug or alcohol user. If the contractor employee is tested by the contractor, the employer cannot obtain the test result absent the specific written consent of the employee. While large employers might have the ability to simply refuse to use the contractor employee in the future, small employers will often not have the same option. Additionally, if, as the preamble to the NPRM notes, many of the contractors are not companies but

are individuals, the employer would have no one to contact to direct the individual to undergo testing. (A similar situation would occur if the offending individual were a senior official at the contracting company.)

Given the complexity of the possible scenarios, BDA recommends that the provision be revised to read as follows (similar language would, of course, be necessary for the alcohol testing provisions):

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2. A contractor employee who performs a safety-sensitive function on the employer's premises and under the supervision of the employer shall be subject to reasonable cause drug testing if the employer makes a determination regarding that contractor employee that meets the criteria of section D.1 of this appendix.

    a. An employer making such a determination shall immediately contact the contractor and direct that the employee undergo testing.

    b. If the contractor is unable to arrange for a urine specimen to be collected for testing within 2 hours of the initial determination to test, the employer shall immediately arrange for the contractor employee to undergo testing utilizing the employer's service providers.

    c. If the contractor arranged for testing, it shall provide a copy of the verified drug test result to the employer. If the employer arranged for testing, it shall provide a copy to the contractor. Consent of the tested individual is not required, nor shall the contractor employee's refusal to give consent preclude the sharing of this information.

    d. No covered employer may utilize the services of a contractor that has refused to direct a contractor employee to undergo a reasonable cause drug test following a proper determination by that employer that such testing was necessary.

Finally, BDA endorses the use of the chart format for instructing companies regarding registration or operations specifications.

Thank you for this opportunity to comment on these proposals.